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Supreme Court
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BRIEF FOR DEFENDANT.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 126.

MARTHA S. MUNSEY, PLAINTIFF IN ERROR,

vs.

M. SWAIN CLOUGH, SHERIFF OF MERRIMACK COUNTY

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE.

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BRIEF FOR THE DEFENDANT.

The plaintiff in error was indicted in Massachusetts for uttering three forged wills. The indictment contained three counts, each alleging the uttering of a different will. The plaintiff in error fled to New Hampshire before she was arrested. A requisition was issued by the Governor of Massachusetts demanding of the Governor of New Hampshire the return of the plaintiff in error as a fugitive from justice. This requisition was honored and a warrant for the return of the plaintiff in error was granted. The plaintiff in error sued out a writ of habeas corpus, and the questions raised by her have been passed upon by the Supreme Court of New Hampshire in State *v.* Clough, 71 N. H. 594, and in State *v.* Clough, 72 N. H. 178.

The questions raised by the plaintiff in error appear in the Assignment of Errors upon pages 37 and 38 of the Transcript of Record. They will be considered in the order in which they are there stated.

First Assignment in Error.

The plaintiff in error claims that the evidence submitted to the Governor of New Hampshire did not justify the issuance of the rendition warrant because it failed to show that she was a fugitive from justice as to all the crimes with which she was charged, and for which she was demanded in the extradition proceedings. She further claims that it appears from the record evidence that she left the state prior to the date of the alleged commission of one of said crimes for which she was demanded for trial, and that the issuance of the rendition warrant upon this evidence deprives her of her liberty without "due process of law" in violation of the 5th Amendment to the Constitution of the United States and denies to her while in its jurisdiction equal protection of the law in violation of the 14th Amendment of the said Constitution, and further that the issuance of a rendition warrant upon this evidence was in violation of Section 2 of Art. 4 of said Constitution which provides that a person charged in any state with treason, felony or other crime who shall flee from justice and be found in another state shall, on the demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime.

The crimes charged against the plaintiff in error are alleged to have been committed respectively, on the 28th day of February, 1895, the 17th day of May, 1895, and the 20th day of November, 1901 (pp. 7–8–9 of Record).

The plaintiff bases this assignment of error upon an expression in the affidavit of one Jophanus H. Whitney, which accompanied the requisition papers and may be found on p. 10 of the Record. This affidavit states that the plaintiff in error fled from the Commonwealth of Massachusetts on or about the 4th day of November, 1901.

I.

At common law the time of the commission of an offence need not be proved as alleged,

Ledbetter *v.* U. S., 170 U. S. 606.
Commonwealth *v.* Sego, 125 Mass. 210, 214.
Commonwealth *v.* Brown, 167 Mass. 144.

This rule of law as to time should have the same application in requisition proceedings that it has in the trial of the case.

Even with an apparent inconsistency between the date alleged in the third count of the indictment and this affidavit the court in the state to which the party charged with the crime has fled is not to assume that the state asking for a return of the fugitive is to be bound at the trial by the date alleged in the indictment. It would be more reasonable to assume that at the trial the offence charged in the third count would appear to have been committed previous to the date of flight as stated in the affidavit.

An indictment which alleges no date for the commission of an offence is good in Massachusetts (Revised Laws of Massachusetts, Chapter 218, Section 20).

II.

The evidence submitted to the Governor of New Hampshire, taken as a whole, should be construed to mean that the defendant fled from Massachusetts after the commission of the last offence charged in the indictment.

The affidavit above referred to states :

(*a*) That Munsey stands charged by indictment with the crime of uttering forged wills as is more fully set forth in the papers annexed.

(*b*) That said Munsey has fled from the limits of the Commonwealth and is a fugitive from justice.

(*c*) That at the time of the commission of said crime she was in the state of Massachusetts, and

(*d*) That at the same time and previous thereto she was a resident of Cambridge.

A fair construction of the statement thus far is that at the time of the commission of each of the offences named in the indictment the defendant was in Massachusetts and was a resident of Cambridge and thereafter fled from the limits of the Commonwealth.

It would be fair for both the Governor of New Hampshire and the court, passing upon the question raised, to find that the whole affidavit meant that the flight occurred after the commission of all the crimes.

It is further to be noticed that the date of flight stated in the affidavit does not purport to be an exact statement of the date. The expression is: that she fled "on or about the 4th day of November."

In addition to this affidavit the Governor of New Hampshire had before him the statement of the Governor of Massachusetts to the effect that the plaintiff in error had fled from justice in that Commonwealth and the statement of the District Attorney to the effect that the plaintiff in error fled from the jurisdiction of Massachusetts to avoid prosecution and is now a fugitive from justice, and that he believes that there is sufficient evidence to convict. It also appears at the end of the first and second counts of the indictment that the Grand Jury found that at no time since the commission of the offences therein set forth had the defendant been usually and publicly a resident of said Commonwealth of Massachusetts.

III.

The attention of the Court is also called to the fact that the plaintiff in error waived the right to submit evidence in the habeas corpus proceedings as to whether she was in fact a fugitive from justice. This issue was then open to her as to all the counts in the indictment.

IV.

It is sufficient to justify the extradition of the plaintiff in error if it appears that she is a fugitive from the state asking her return as to one crime committed in the state.

If the state asking for the return of a party indicted is bound for the purpose of requisition by the dates alleged in the indictment, and if the affidavit in question in connection with other facts that appear of record is to be construed to mean that the defendant fled from Massachusetts before the commission of the offences alleged in the last count of the indictment, even then it appears that she fled from Massachusetts after the commission of the offences set out in the first and second counts of the indictment.

The statement of the law on this point appears in the opinion of the Superior Court of New Hampshire (p. 17 of the Record.)

"But the fact, if it be one, that the relator departed from the demanding state before the commission of one crime alleged in the indictment, for which alone she could not be extradited, suggests no reason why she could not legally be returned for other crimes alleged to have been committed there before she left. The possibility that she may be tried on the last count alone does not exclude her from the class of persons made liable to extradition by the Federal Constitution. She is still "a person * * * charged with * * * crime." The question is, not whether the governor might decline to extradite her for that reason, or because he believed the demand was not made in good faith, but whether her rights of citizenship are infringed by her rendition to answer to such an indictment. Neither the constitution nor the statutes upon the subject make an exception of that character.

Lascelles *v.* Georgia, 148 U. S. 537, 542, 547.
Commonwealth *v.* Wright, 158 Mass. 149.

If the indictment upon which this proceeding is based had contained only the first count, but it appeared that another indict-

ment containing the other counts was pending in the same court, that fact would not prevent the rendition of the prisoner, though the question in legal effect would be substantially the same as is presented here. The governor was justified in finding that she was a fugitive with reference to the first two counts in the indictment. But upon that question the relator is entitled to submit evidence and be heard; and the justice before whom the habeas corpus proceedings were returned may review the action of the governor in this respect. The governor's finding that the relator is a fugitive is not conclusive upon the court on habeas corpus.

Church Habeas Corpus, S. 474 a.
2 Moore Ext., s. 640.
Spear, Extrad. 391.
Hartman *v.* Aveline, 63 Ind. 344.
Jones *v.* Leonard, 50 Ia. 106.
In re Mohr, 73 Ala. 503.

V.

"An indictment is sufficient for the purpose of extradition proceedings when it is framed in accordance with the technical rules of pleading of the state within which it is found, and where the offence was committed."

Encyclopedia of Pleading and Practice, p. 816.

Should this court consider that the plaintiff has in this first assignment of error raised a question as to the sufficiency of an indictment which contains more than one count, it will be found, we submit, that this indictment conforms to the requirements of the law of Massachusetts.

In support of this proposition we would direct the court's attention to the following cases:

In Commonwealth *v.* Hills, 10 Cush. 530, the indictment contained four counts, the first and second described the same offence,

but the third and fourth each described an offence different from that charged in the first and second counts.

The jury found the defendant guilty on the second and fourth counts, and not guilty on the first and third.

The Court, in considering the questions of law raised by the joinder of distinct offences in one indictment, says:

"In the view we take of this matter, it is unnecessary to consider particularly the question whether these charges are felonies, inasmuch as we are satisfied that the long-established practice in this commonwealth has been to present distinct larcenies in the same indictment, and also distinct offences of receiving stolen goods in the same indictment, in different counts. It has been considered to be no objection to this practice that the charges were felonies, provided that they were offences of the same general nature requiring the same mode of trial, and having the punishment annexed to them of a like nature. In the case of Carlton *v.* Commonwealth, 5 Met. 532, this practice was fully recognized and sanctioned. It is always open to the presiding judge to order a separate trial in each distinct charge, when there is any reason for supposing that the defendant will be perplexed in his defence or unnecessarily embarrassed by being put on trial for two distinct offences. We see no good reason for holding that it is illegal to present in the same indictment felonious offences of a similar character, and having a like punishment. In misdemeanors, it is admitted that this may be done, and the distinction set up as to felonies as a class is by no means a satisfactory distinction, or based on any sound principle; as many petty offences, as, for example, larcenies of the most trifling amount, have always heretofore, and until the very recent statute of 1852, c. 4, been denominated felonies.

"Under the limitation as to the nature and character of the offences joined, as was very fully and properly stated by the presiding judge, the court are of opinion that distinct felonies may be charged in the same indictment, and that the ordering of separate

trials in such case is a matter to be decided by the presiding judge. The result is that all the exceptions taken are overruled."

We would also call attention to Commonwealth *v.* Costello, 120 Mass. 358.

This was an indictment for forgery in four counts; the first count being for forging a certain bond, the second, for uttering that bond, the third, for forging an entirely different bond on another occasion, and the fourth for uttering the second bond.

The defendant moved to quash the indictment on the ground that there being two distinct and felonious acts, not parts of the same transaction, such counts were improperly joined, but the court held:

"It has long been common in practice in this Commonwealth to include in one indictment charges of distinct substantive acts, even when such acts are felonious in their character, if they are of the same general description and the mode of trial and the nature of the punishment are the same. The correctness of this has been recognized fully by several decisions of this court, and it has been held that it is competent for the court, if it sees any danger that the defendant will be embarrassed by the multiplicity of the charges against him, to direct the government to proceed upon one count or sets of counts only, so that no rights of the defendant are imperiled thereby. Carlton *v.* Commonwealth, 5 Met. 532; Booth *v.* Commonwealth, 5 Met. 535; Joslyn *v.* Commonwealth, 6 Met. 236; Commonwealth *v.* Cain, 102 Mass. 487; Commonwealth *v.* Sullivan, 104 Mass. 552. Nor has the matter of joinder of offences distinct and separate in their character been in any way changed by the statute of 1861, c. 181, but continues to stand exactly as it did previous to this enactment."

See also Carlton *v.* Commonwealth, 5 Met. 532; Commonwealth *v.* Jacobs, 152 Mass. 276; Benson *v.* Commonwealth, 158 Mass. 164.

Conclusion.

If the record evidence that accompained the indictment fairly interpreted means that the defendant fled from the state where the crime was committed after the commission of all the crimes, there is no error under the First Assignment of Errors.

If the affidavit of Whitney is to be construed as claimed by the plaintiff in error, even then none of her rights have been violated because it appears that she committed at least two of the alleged offences previous to the date when the affidavit states that she fled from the jurisdiction of Massachusetts.

If, after the return of Munsey to the demanding state, she ought not to be put to her trial upon the third count of the indictment her rights will be fully protected by the court in which the trial is to be held.

Second Assignment of Error.

That the evidence contained in the requisition papers did not legally authorize a finding by the Governor that the plaintiff in error was a fugitive from justice as to any one of the crimes for which she was demanded.

This assignment has been considered in part in connection with the first assignment.

It is possible that the plaintiff in error may claim that the first two offences were barred by the statute of limitations before the dates stated in the Whitney affidavit as the approximate date upon which she fled, but the allegation in the indictment that the defendant has not been usually and publicly a resident of said Commonwealth since the commission of the offences takes the case out of the Statute of Limitations (Revised Laws of Massachusetts, Chap. 218, Sec. 52).

Third Assignment of Error.

That the documentary evidence submitted to the Governor was not competent to be considered by him on the question of fact whether the party indicted was a fugitive from justice, and especially that the Whitney affidavit was not competent evidence to be so considered.

(*a*) The law does not describe the character of evidence which the chief magistrate should have before granting a warrant to arrest

upon requisition, nor the precise rules by which facts shall be established before him.

Rev. Stat., Sec. 5278.
State *v.* Clough, 71 N. H. 594.

(*b*) "The issuance of the warrant embraces the exercise of the prerogative of the Governor of the state where the fugitive is and it must be presumed, in the absence of proof to the contrary, where the Executive acts in such case that he has performed his duty in that respect. Hence, when a proper warrant has been issued the burden of showing that the prisoner has not fled or is not a fugitive from justice rests upon the prisoner in habeas corpus proceedings."

State *v.* Justus, 24 Minn. 237.

(*c*) A party is a fugitive, if, having within a state committed that which by its laws constitutes a crime, he has left its jurisdiction and is found within the territory of another, when he is sought to be subjected to the criminal processes of the state where the crime is committed.

Roberts *v.* Reilly, 116 U. S. 80.

The fact that a man is charged with a crime in one state and is afterwards found in another has generally been regarded as prima facie evidence that he is a fugitive.

In the matter of Voorhees, 32 N. J. (Law) 141.

(*d*) Whether the relator is charged with a crime in another state, and whether she is a fugitive from justice, are questions upon which it was the duty of the governor to pass before ordering her removal from the state.

"Under the act of Congress, it became the duty of the governor of Utah to cause the arrest of Reggel, and his delivery to the agent appointed to receive him, when it appeared:

(1) That the demand by the executive authority of Pennsyl-

vania was accompanied by a copy of an indictment, or affidavit, made before a magistrate charging Reggel with having committed treason, felony or other crime within that state, and certified as authentic by her governor; (2), that the person demanded was a fugitive from justice."

Ex parte Reggel, 114 U. S. 642, 649.

"To be a fugitive from justice, in the sense of the Act of Congress regulating the subject under consideration, it is not necessary that the party charged should have left the state in which the crime is alleged to have been committed after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun; but simply that having, within a state, committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offence he has left its jurisdiction, and is found within the territory of another."

Roberts *v.* Reilly, 116 U. S. 80, 97.

(*e*) The Governor in determining the question as to whether the defendant is a fugitive from justice may receive evidence that fails to meet the requirements of legal proof if he deems it advisable.

It appears to have been the policy of Congress and the Legislature to permit the chief magistrate to determine the question upon such proof as seems to him worthy of credit.

State *v.* Clough, 71 N. H. 594.
Roberts *v.* Reilly, 116 U. S. 80.
In re Cook, 49 Fed. Rep. 833.

It is submitted that upon the indictment, the statement of the District Attorney, and the request of the Governor of Massachusetts, the Governor of New Hampshire would have been justified in finding that the defendant Munsey was a fugitive from justice and in ordering her return.

(*f*) The affidavit of Whitney is not required by the Constitution of the United States nor by any act of Congress. It is un-

doubtedly attached to the requisition papers to conform to Revised Laws of Massachusetts, Chap. 217, Sec. 11, which provides that sworn proof that the accused is a fugitive from justice shall accompany an application for a requisition to the Governor. It was primarily intended to assist the Governor of Massachusetts in deciding the question whether he should ask for the return of the party indicted. No reason can be suggested why the Governor of New Hampshire should not also consider this evidence. It was sworn to before a Justice of the Peace.

(*g*) It also appears under the seal of the Commonwealth of Massachusetts that the documents annexed to this request for a rendition of the plaintiff in error are authentic and duly authenticated. Upon this presentation of facts to the Governor of New Hampshire he was justified in issuing his warrant for the return of Munsey.

(*h*) When the Governor of New Hampshire was satisfied, from any evidence which he chose to receive, that the defendant Munsey was a fugitive from justice, he had no discretion in the matter. His duty to sign the warrant was peremptory and prescribed by statute.

His duty, we contend, is made plain, by the language of Rev. Stats. U. S., sec. 5278, which is:

"Whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony or other crime, *certified as authentic by the governor or chief magistrate of the state or territory from whence the person charged has fled*, it shall be the duty of the executive authority of the state or territory to which such person has fled, to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear."

The duty of the governor is further plainly indicated by Sec. 8, c. 263, of the Public Statutes of New Hampshire, in which it is provided: "*If the governor is satisfied that the demand is conformable to law and ought to be complied with, he shall issue his warrant under the seal of the state,* authorizing the agent who shall make the demand, either forthwith or at such time as shall be designated in the warrant, to take and transport such person to the line of the state, at the expense of such agent, and shall also, by the warrant, require the civil officers within this state to afford all needful assistance in the execution thereof."

Thus it became not the mere privilege, but the duty of the Governor of New Hampshire to act in the premises. It was discretionary with him, we submit, to grant an extended hearing on sundry questions of fact, if he deemed it essential or desirable, but it cannot be reasonably urged that he was bound so to do.

There is neither authority nor precedent to justify such a contention. His duty is made clear by the provisions of the Revised Statutes of the United States and the Statutes of New Hampshire cited above.

Ex parte Reggel, 114 U. S. 642, 649.

Therefore, in this case, we submit, every essential was complied with, and the governor in issuing his warrant was doing what he became bound, under the constitution and laws of the United States, to do on being satisfied that the necessary and proper steps had been taken in the case before him.

Fourth Assignment of Error.

That the refusal of the Governor of New Hampshire to hear the defendant Munsey before a warrant for her arrest was issued by him was not "due process of law" and deprived the defendant Munsey of her legal rights under the provisions of the 5th and 14th amendments to the Constitution of the United States.

If the proposition stated under the third assignment is correct, the Governor had a right to decide to issue the requisition upon any evidence that seemed to him sufficient and was under no obligation to hear the defendant. Her constitutional right to a judicial trial was given her in the proceedings on the writ of habeas corpus. She then had an opportunity to submit evidence on the question of fact as to whether she was a fugitive from justice and she declined to offer any evidence on that question. If the court had found that there was error in the finding of the Governor on this question the defendant Munsey would have been entitled to her discharge.

State *v.* Clough, 71 N. H. 594.

The habeas corpus proceedings were "due process of law" within the meaning of the Constitution, and gave the plaintiff in error an opportunity to review the action of the Governor in issuing the warrant for her arrest and the Governor's finding that she was a fugitive was not conclusive upon the court on habeas corpus.

Church on Habeas Corpus, Sec. 474 a.
Harmon *v.* Aveline, 63 Ind. 344.

The defendant Munsey has, therefore, been fully protected in all of her constitutional and legal rights.

Eleven days after her arrest she was given the fullest opportunity to present to the superior court the evidence in her behalf, if any, which she says the Governor of New Hampshire declined to hear and to try the question whether she was in fact a fugitive from justice.

She did not choose to do this, nor did she choose to present any evidence on any question, at the final hearing thirteen days later, contenting herself with further technical objections to the method of procedure of the governor, and even more technical and refined objections with reference to certain portions of the documentary proof submitted in support of the request for extradition of the Massachusetts executive.

We would suggest that not only has she been denied no rights, but that if the delay which has ensued in this case should become possible in all matters of this kind, the purposes sought to be gained by extradition laws would be defeated and destroyed.

Fifth Assignment of Error.

That the requisition papers do not show that the defendant is substantially charged with crime because the crimes are alleged to have been committed in 1895 and 1901 respectively, while the certificate of the Clerk of Court, which accompanied the papers, stated that the indictment was filed in court on the second Monday of February, 1892. This date stated in the certificate is clearly a clerical error and was intended for the second Monday of February, 1902.

The indictment on its face shows that it was found at the sitting of the Superior Court for the County of Middlesex on the second Monday of February, 1902.

The requisition of the Governor of Massachusetts shows that this, as well as the other papers, is authentic and duly authenticated.

The certificate of the District Attorney (p. 11) states that the indictment was not found by the Grand Jury until the February sitting of the Superior Court in the year 1902.

It also appears from the decision of the Supreme Court of New Hampshire (p. 22) that it was a clerical error, and that the error was cured by an amendment of the Clerk's certificate in the Court of New Hampshire.

The court says:

"The evidently clerical error in the affidavit of the clerk of the court, that the indictment was returned 'on the second Monday of February, A. D. 1892,' did not preclude a finding by the governor that the true date was the second Monday of February, 1902. The caption of the indictment, as well as the affidavit of the district attorney, fully authorized that conclusion, which is placed beyond peradventure by an amendment of the clerk's affidavit in this court.

The objection urged on this ground is a refinement of technical reasoning, which has nothing to commend it in the modern administration of justice in criminal cases."

SIXTH ASSIGNMENT OF ERROR.

That the defendant Munsey was illegally restrained of her liberty and entitled to be discharged, and that there was error in law rendering judgment against her.

This assignment seems to raise no question other than those that have heretofore been considered.

EDWIN G. EASTMAN,
GEORGE A. SANDERSON,
For Defendant.